1993

State of Utah vs. Sonja Swanson : Brief of Appellee

Utah Court of Appeals

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DOCKET NO. 930160

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 930160-CA
v.	:	
SONJA LE SWANSON,	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION OF POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(1)(a)(iv) (CUM. SUPP. 1993) IN THE FIFTH JUDICIAL DISTRICT COURT, WASHINGTON COUNTY, THE HONORABLE JAMES L. SHUMATE PRESIDING.

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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF THE PROCEEDINGS

Defendant appeals from a conviction by guilty plea of possession of a controlled substance with intent to distribute, a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iv) (Cum. Supp. 1993), in the Fifth Judicial District Court, Washington County, the Honorable James L. Shumate presiding. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1993).

ISSUES PRESENTED ON APPEAL AND STANDARDS OF REVIEW

1. **Attorney/Firm Relationship.** Did the district court err in determining that the prosecutorial and governmental functions performed by members of the firm of Gallian, Westfall & Wilcox did not embroil defendant's appointed counsel in a conflict of interest under State v. Brown?

The Utah Supreme Court has stated that it will review a trial court's "determination of whether a given set of facts comes within the reach of a given rule of law" for correctness,

according the trial court "a measure of discretion" or "some discretion"; however, "precisely how much discretion we cannot say." State v. Pena, No. 930101, slip op. at 5, 10, 11 n.6 (Utah Feb. 15, 1994).

2. **Ineffective Assistance.** Was defendant's appointed counsel otherwise ineffective under the sixth amendment?

> [I]neffective assistance of counsel claims present a mixed question of fact and law. Therefore, in a situation where a trial court has previously heard a motion based on ineffective assistance of counsel, reviewing courts are free to make an independent determination of a trial court's conclusions. The factual findings of the trial court, however, shall not be set aside on appeal unless clearly erroneous.

State v. Templin, 805 P.2d 182, 186 (Utah 1990) (citing Strickland v. Washington, 466 U.S. 668, 698 (1984)).

3. **Attorney's Fees.** Should this Court award attorney's fees to defendant for private, non-appointed counsel under Utah Code Ann. § 77-32-2 (Supp. 1993)?

This issue does not require this Court to review any ruling of the district court.

4. **General Order.** Does this Court have jurisdiction to promulgate a general order governing attorney conflicts of interest?

This issue does not require this Court to review any ruling of the district court.

5. **Dismissal of Charges.** If this Court finds that defendant's representation did not comport with applicable law, should all charges against defendant be dismissed with prejudice?

This issue does not require this Court to review any ruling of the district court.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 77-32-2. Assignment of counsel on request of defendant or order of court.

(1) Counsel shall be assigned to represent each indigent person who is under arrest for or charged with a crime in which there is a substantial probability that the penalty to be imposed is confinement in either jail or prison if:

(a) the defendant requests it; or

(b) the court on its own motion or otherwise so orders and the defendant does not affirmatively waive or reject on the record the opportunity to be represented.

(2) (a) If the county, city, or town responsible to provide for the legal defense of an indigent defendant has arranged by contract to provide those services and the court has received notice or a copy of such contract, the court shall appoint the contracting attorney as legal counsel to represent that defendant.

(b) The court shall select and appoint the attorney or attorneys if:

(i) the contract for indigent legal services is with multiple attorneys; or

(ii) the contract is with an additional attorney or attorneys in the event of a conflict of interest.

(c) If the court considers the appointment of a noncontracting attorney to provide legal services to an indigent defendant despite the existence of an indigent legal services contract and the court has a copy or notice of such contract, before the court may make the appointment, it shall:

(i) set the matter for a hearing;

(ii) give proper notice to the attorney of the responsible county, city, or town of the hearing; and

(iii) make findings that there is a compelling reason to appoint a noncontracting attorney.

(d) The indigent defendant's mere preference for other counsel shall not be considered a compelling reason justifying the appointment of a noncontracting attorney.

Utah Code Ann. § 77-32-3. Duties of assigned counsel - Compensation.

(1) When representing an indigent person the assigned counsel shall:

(a) Counsel and defend him at every stage of the proceeding following assignment; and

(b) Prosecute any first appeal of right or other remedies before or after conviction that he considers to be in the interest of justice except for other and subsequent discretionary appeals or discretionary writ proceedings.

(2) An assigned counsel shall not have the duty or power under this section to represent an indigent defendant in any discretionary appeal or action for a discretionary writ, other than in a meaningful first appeal of right to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the appellate process of this state.

(3) An assigned counsel for an indigent defendant shall be entitled to compensation upon the approval of the district court where the original trial was held, upon a showing that the defendant has been denied a constitutional right or that there was newly discovered evidence that would show the defendant's innocence and that the legal services rendered by counsel were other than that required under this act or under a separate fee arrangement and were necessary for the indigent defendant and not for the purpose of delaying the judgment of the original trier of fact.

Utah R. Prof. Cond. 1.10(a).

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8(c), 1.9 or 2.2.

STATEMENT OF THE CASE

Defendant was charged by information as follows:

Count I	**Possession of a controlled substance with intent to distribute,** a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iv) (Cum. Supp. 1993)
Count II	**Possession of drug paraphernalia,** a class B misdemeanor, in violation of Utah Code Ann. § 58-37a-5 (1990)

(R. 2). On January 14, 1993, at a "felony arraignment," the district court questioned defendant as to her assets and appointed public defender J. MacArthur Wright as her counsel (R. 3, 105). Defendant pled guilty to count I, and the court dismissed count II (R. 15-16).

Defendant was sentenced to 1 to 15 years and a fine of $10,000 (R. 52). Execution of the sentence was stayed and defendant was placed on 36-month probation and ordered to serve 60 days in the Washington County Jail, 30 days of which were stayed upon condition that defendant obtain substance abuse counseling (R. 53). Defendant appeals from this judgment (R. 69-71).

On March 4, 1993, R. Clayton Huntsman entered his appearance as defendant's counsel and filed a notice of appeal and a petition for a certificate of probable cause (R. 21-29).

On March 10, 1993, defendant moved for an order finding her indigent and requiring the county to pay for her transcript and other costs (R. 48-50). On March 12, 1993, defendant filed a motion for costs and attorney's fees, alleging bad faith on the part of the Washington County Attorney's Office (R. 56-59). The

same day, after a hearing, the district court found defendant to be indigent and ordered Washington County to pay for a transcript of all proceedings on her case, "as well as costs of the first right of appeal, including appeal of the Certificate of Probable Cause if necessary" (R. 63-64, 66). However, the court denied defendant's request for attorney's fees on the ground that the court found no bad faith on the part of the State (R. 66, 86-87).

Near the end of the hearing on the certificate of probable cause, the prosecution made two offers on the record. Notwithstanding its belief that defendant was "treated fairly and provided with very competent and effective counsel," the State stipulated that defendant could withdraw her guilty plea "and the Court could reset the case for a jury trial and let justice prevail." In the alternative, the State stipulated "that a Certificate of Probable Cause should issue in this case" (R. 293). Defendant responded to neither of these offers.

On March 17, 1993, after a hearing, the district court granted the certificate of probable cause (R. 67-68). The court drafted its own findings of fact and conclusions of law (R. 91-98, addendum E).

STATEMENT OF FACTS

After she was sentenced, defendant asked Clayton Huntsman, her present counsel, to assist her (R. 33). He filed a notice of appeal and represented her at the hearing on her

petition for a certificate of probable cause. The following facts were adduced at the hearing on the petition.

Mr. Wright is one of two Washington County public defenders. He handles half of all non-capital criminal cases and all the capital cases (R. 224-25, 262).

After Mr. Wright had been appointed, defendant contacted him by calling the number listed in the telephone directory for the firm of Gallian & Westfall (R. 158). She was familiar with the firm because she had hired John Hummel of the firm to represent her in a custody dispute involving her daughter (R. 239).

Mr. Wright appears in a photograph of the members of Gallian, Westfall & Wilcox published in a display ad in a local telephone directory (Exhibit D-1, page 19; R. 185; addendum A). Defendant had seen this photograph of the law firm or another like it before she entered her guilty plea (R. 245-460).

In that directory, Mr. Wright is listed as a member of the firm without additional designation, although he had intended for his name to be listed as "of counsel" and the printers were told to list it that way (Exhibit D-1, page 18; R. 185, 270; addendum B). In a telephone directory issued by another publisher, Mr. Wright is listed as "of counsel" (Ex. D-3, R. 187, addendum C). Mr. Wright's name appears on the firm letterhead, designated as "of counsel" (Ex. P-2, R. 183, addendum D). The firm pays for the letterhead (R. 274).

When asked to define the term "of counsel," Mr. Wright testified, "I don't define it. I can tell you what our relationship is, if that's what you want" (R. 180). Defendant testified that she did not know what "of counsel" meant (R. 250). Russell Gallian testified that he did not think there was a legal definition of the term, that it "describes a relationship that is not an employee and not a partner," that its meaning "varies quite a bit depending upon the specific relationship," and that he had always thought of it as like an office sharing arrangement, at least economically (R. 258-59, 267). Mr. Wright does not associate with the firm on any case (R. 260).

The firm name, "Gallian, Westfall & Wilcox," appears on the law firm's office door (R. 158-59). Mr. Wright's name does not (R. 186). If a client came to the office looking for Mr. Wright, he or she would have to go through the firm's offices in order to find Mr. Wright (R. 187). As of December 1992, Mr. Wright's office was moved down the hall "to try and create a little more separation" (R. 269).

Mr. Wright pays a specific flat amount of rent plus "a percentage of his civil cases" to the firm each month (R. 180, 254). He also shares secretary, receptionist, word processing, and telephone services (R. 180-81). Mr. Wright's secretary uses her word processor for all the attorneys she works for, including other members of the firm (R. 182). Mr. Wright testified that his secretary does not discuss his cases with anybody else, nor

anyone else's cases with him (R. 189). Nor does he have any knowledge about the cases the firm prosecutes in the town of Ivins (R. 190).

Mr. Wright testified that he would not go on the opposite side of a case that the Gallian firm was handling, in part because "I wouldn't want to appear that there was any problem" (R. 190). He further testified, "If Miss Swanson obviously had been sued by Gallian & Westfall or was a client of Gallian & Westfall, I'd say that I certainly would not have been able to have represented her. But she was not" (R. 199).

Mr. Gallian is the senior partner in the law firm of Gallian & Westfall, also known as Gallian, Westfall & Wilcox (R. 180, 253). Mr. Gallian and his firm are the town attorneys for the town of Ivins (R. 143-44, 254).[1] John Hummel of that firm appeared as a prosecutor in the justice court in Ivins (R. 145).[2]

As town attorney, Mr. Gallian's job description includes advising the town with regard to police policies or practices and giving legal opinions to police officers (R. 275-76). The town of Ivins contracts with two Washington County

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[1] The firm discontinued its prosecutorial function the evening prior to the hearing (R. 311). At that time, Mr. Wright's representation of defendant had been completed.

[2] John Hummel also serves as the public defender for the City of Kanab (R. 311).

sheriffs to serve as town police officers (R. 277). However, Mr. Gallian is not involved in any prosecutorial decisions (R. 278).

Mr. Gallian also serves as a Washington County commissioner (R. 253). He supervises the county attorney's office, the jail, the sheriff's department, and other law enforcement, and is involved in issues such as salaries, hiring, firing, retention, and promotions. However, he is not involved in day-to-day law enforcement activities (R. 264). Mr. Gallian has never voted on Mr. Wright's contract with the county, and testified that if it comes to a vote, he'll abstain (R. 256).

Since becoming public defender, Mr. Wright has not prosecuted a case in Washington County or in the town of Ivins (R. 201, 255).

Steve Trost, Utah Bar counsel, testified as an expert on matters of attorney ethics (R. 296). He testified that although "of counsel" is an amorphous term, it indicates an association closer to a partnership than to an office-sharing arrangement (R. 301-02).

Mr. Trost also gave his expert opinion that it was unethical for Mr. Wright to act as public defender in light of his arrangement with Gallian, Westfall & Wilcox (R. 304).

SUMMARY OF ARGUMENT

1. In the trial court, the State stipulated to the withdrawal of defendant's guilty plea. In the same spirit, the State on appeal concedes reversible error in this case. Defen-

dant's appointed defense counsel had a close *of counsel* relationship with the firm of Gallian, Westfall & Wilcox. Members of that firm acted as prosecutors and police advisors in the town of Ivins and served on the Washington County Commission. Although State v. Brown, 853 P.2d 851 (Utah 1992), does not address the question of imputation of conflicts, on the facts of this case, the appointment of defendant's counsel violated the principle of that case. Consequently, this case should be remanded to permit defendant to withdraw her guilty plea and for appointment of conflict-free counsel.

2. In view of the State's concession of reversible error under Brown, this Court need not reach the issue of ineffectiveness of counsel.

3. This Court should not award attorney's fees to defendant's present appellate counsel. First, this claim is raised for the first time on appeal. Second, present defense counsel never sought nor received an appointment, but appeared at defendant's request in a private capacity. He has at no time complied with the statutory procedure for appointment and compensation of indigent's counsel. Moreover, it would be inequitable to charge the public with funding an appeal for the purpose of achieving relief to which the State stipulated in the trial court. Finally, defendant's request for attorney's fees for *amicus* is unsupported by any authority and so must fail.

4. Defendant asks this Court to promulgate a general order governing appointed defense counsel s conflicts of interest. This Court lacks the authority to enter such an order. Furthermore, defendant has not complied with the procedure established by the Utah Supreme Court for adopting general ethical rules.

5. Defendant seeks dismissal of all charges against her with prejudice. This claim was not preserved below and is unsupported by any authority. It must accordingly be denied.

ARGUMENT

POINT I

APPOINTED COUNSEL'S ASSOCIATION WITH A FIRM WHOSE MEMBERS PROSECUTED AND SUPERVISED PROSECUTORS AND POLICE CREATED A CONFLICT OF INTEREST UNDER *STATE V. BROWN* AND REQUIRES VACATION OF DEFENDANT'S GUILTY PLEA

In the trial court, the State offered to stipulate that defendant could withdraw her guilty plea and go to trial. Before the conclusion of the evidence, the prosecutor stated:

> MR. LUDLOW: I've got a proposal to Miss Swanson, Your Honor. If the defendant agrees to withdraw her appeal, the State will stipulate that she can withdraw her guilty plea, and the Court could reset the case for a jury trial and let justice prevail. If the defendant fees like she's [been] cheated out of a jury trial, or if she feels like some injustice was committed. Although the State believes she was treated fairly and provided with very competent and effective counsel.

(R. 293).[3] Neither defendant nor the court even responded to this offer (*see* R. 293-94). The State now concedes that the public defender's conflict of interest requires vacation of defendant's guilty plea, the same remedy it offered to stipulate to below. This point will set forth the State's rationale for this conclusion.

A. The District Court Erred In Finding that the Relationship Between Gallian, Westfall & Wilcox and Defense Counsel Was One of Landlord/Tenant.

The trial court found that the relationship between the law firm of Gallian, Westfall & Wilcox and the public defender J. MacArthur Wright is one of landlord/tenant (R. 93, addendum E). Defendant and *amicus curiae* contest this finding (Brief of Appellant [hereinafter Br. App.] 33; Brief of *Amicus Curiae* [hereinafter Br. Am. 9 n.1).

Two possible standards of review apply. This issue might be seen as entailing review of an "historical" fact under the clearly erroneous standard. [cite]. Or it might be seen as entailing review of a "determination of whether a given set of facts comes within the reach of a given rule of law," reviewable under the sliding scale of State v. Pena, No. 930101, slip op. at 5, 10, 11 n.6 (Utah Feb. 15, 1994). This Court need not resolve which standard applies, as the State concedes that the finding is clearly erroneous, thereby satisfying both standards.

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[3] The prosecution stipulated in the alternative to issuance of the certificate of probable cause (R. 293).

Findings are clearly erroneous only if they "are against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made." State v. Walker, 743 P.2d 191, 193 (Utah 1987).

Here, all the evidence presented in the trial court tended to show that Mr. Wright's practice was intertwined with that of the Gallian firm and that he was on "of counsel" status with the firm. There was no testimony that anyone viewed his relationship with the firm as merely one of landlord/tenant.

The Utah Bar counsel gave his uncontradicted expert opinion that although *of counsel* is an amorphous term, it indicates an association closer to a partnership than to an office-sharing arrangement. A formal ABA ethics opinion defines the "core characteristic" properly denoted by the term *of counsel* as

> a "close, regular, personal relationship"; but a relationship which is neither that of a partner (or its equivalent, a principal of a professional corporation), with the shared liability and/or managerial responsibility implied by that term; nor, on the other hand, the status ordinarily conveyed by the term "associate," which is to say a junior non-partner lawyer, regularly employed by the firm.

ABA Comm. on Professional Ethics and Professional Responsibility, Formal Op. 90-357 (1990).

B. On the Facts of This Case, Gallian's Conflict of Interest Must Be Imputed to Wright.

In State v. Brown, 853 P.2d 851 (Utah 1992), the Utah Supreme Court announced a *per se* rule of reversal whenever a city attorney with prosecutorial responsibilities is appointed to represent an indigent defendant. Id. at 857, 859. While citing the Utah Code and the Utah Rules of Professional Conduct, the court stated that it was acting pursuant to its "inherent supervisory power over the courts" as well as its "express power to govern the practice of law." Id. at 857.

This rule would clearly prohibit attorney Gallian from serving as a public defender. However, attorney Wright performs no prosecutorial functions. Nevertheless, the State believes that *on the facts of this particular case,* the conflict of interest must be imputed to Mr. Wright.

Rule 1.10(a), Utah Rules of Professional Conduct states: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8(c), 1.9 or 2.2." There seems no good reason not to extend the reach of this rule to attorneys who are *of counsel* to a firm. The American Bar Association has opined, "There can be no doubt that an of counsel lawyer (or firm) is 'associated in' and has an 'association with' the firm (or firms) to which the lawyer is of counsel, for purposes of . . . the general imputation of disqualification pursuant to Rule 1.10 of the Model Rules . . ." ABA

Comm. on Professional Ethics and Professional Responsibility, Formal Op. 90-357 (1990).

Moreover, the Ethics Advisory Committee of the Utah State Bar has recently published its Opinion No. 126. It reads in part: "A city attorney with prosecutorial functions may not represent a criminal defense client in any jurisdiction. . . . An attorney who is a partner or associate of a city attorney may not represent a criminal defense client in any situation where the city attorney is so prohibited." *Utah State Bar Commission Approves Ethics Opinions & 60-Day Comment Period,* Utah Bar Journal, March 1994, at 23. This opinion forbids an attorney associated with a city attorney who performs prosecutorial functions to represent a criminal defense client in any jurisdiction. Bar opinions do not bind courts or even practitioners, but they do bind bar disciplinary counsel and are entitled to some measure of consideration by this Court.

On the facts of this case, where the firm and the involved communities are small, the public defender is closely identified with the firm in public advertisements, and the strands of potential conflict are many, the State concedes that Mr. Wright's representation of defendant as appointed counsel ran afoul of Brown. Accordingly, even without a "concrete showing of prejudice," the appropriate remedy is reversal of the conviction and remand for a new trial, or in this instance, a new plea. Brown, 853 P.2d at 859, 861.

POINT II

THIS COURT NEED NOT REACH DEFENDANT'S SIXTH AMENDMENT INEFFECTIVENESS OF COUNSEL CHALLENGE

Defendant also claims that she was deprived of the effective assistance of counsel as guaranteed by the sixth amendment (Br. App. 35) (citing Strickland v. Washington, 466 U.S. 668 (1983)). In view of the State's confession of reversible error on the issue of dual representation, this Court need not reach the question of ineffective assistance.

POINT III

THIS COURT SHOULD NOT AWARD DEFENDANT ATTORNEY'S FEES UNDER UTAH CODE ANN. § 77-32-2 FOR PRIVATE, NON-APPOINTED COUNSEL

In the trial court, defendant moved for an award of attorney's fees under Utah Code Ann. § 78-27-56 (1992) on the ground that the State had acted in bad faith. Although defendant informs the Court that she sought fees under this statute below, she has apparently abandoned this argument on appeal (Br. 38). The State will therefore not address it.[4]

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[4] Section 78-27-56 is mentioned once in the brief, although it is misidentified. This is the reference:

> Present counsel requested attorneys fees already from the District Court, and same was denied. See Addendum, App. 3, "Order Denying Attorneys Fees". U.C.A. § 77-27-56 [sic] authorizes attorneys fees in civil cases, and UrCivP [sic] 81(e) authorizes application of the Rules of Civil Procedure to criminal cases.

So far as section 78-27-56 is concerned, the brief contains no further analysis or argument, nor does it include citations to any authorities

Defendant argues that this Court should appoint defendant's appellate counsel under Utah Code Ann. § 77-32-2 and should, pursuant to that statute, award attorney's fees for "challenging an unjust conviction,"[5] obtaining a certificate of probable cause, and bringing the appeal (Br. App. 38).

Defendant asserts this claim for the first time on appeal. In the probable cause hearing, the court asked present defense counsel, "With respect to the motion for attorney's fees, what is your legal basis for that, Mr. Huntsman?" Counsel responded that he relied upon Utah Code Ann. § 78-27-56 and that he reserved any common law theories such as quantum meruit. He did not mention section 77-32-2 (*see* R. 288).

"As the Utah appellate courts have reiterated many times, [they] generally will not consider an issue, even a constitutional one, which the appellant raises on appeal for the first time." State v. Webb, 790 P.2d 65, 77 (Utah App. 1990). Similarly, where a defendant fails to assert a particular ground for relief in the trial court, an appellate court will not consider that ground on appeal. Id. (citing State v. Carter, 707

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or parts of the record relied on as required by rule 24(a)(9), Utah Rules of Appellate Procedure. The State therefore concludes that this section has been abandoned as a ground for defendant's claim on appeal for attorney's fees.

[5] It is unclear what this phrase refers to if not the certificate of probable cause and the appeal. Defendant did not move to withdraw her guilty plea in the trial court.

P.2d 656, 660 (Utah 1985)). Accordingly, this Court should not consider defendant's attorney's fee claim on appeal.

Insofar as defendant's claim may be read as a motion for attorney's fees on appeal directed to this Court in the first instance (*see* Br. App. at 38-39), it is misdirected.

Section 77-32-2(2)(c) sets out a procedure to be followed in appointing a non-contracting attorney in a county, like Washington County, which has contracted for indigent legal services. Where the county has contracted with conflicts counsel, they are to be appointed. § 77-32-2(2)(b). Washington County has contracted with Douglas Terry to handle cases in which MacArthur Wright has a conflict (R. 224-25). Defendant has never intimated that Mr. Terry was prevented from representing her by a conflict of interest.

In the event that no contracting attorney is able to represent an indigent defendant, the statute provides for appointing a non-contracting attorney. It requires (a) a hearing; (b) notice to the county attorney; and (c) "findings that there is a compelling reasons to appoint a noncontracting attorney." Id. In this case, defendant and her present counsel made no effort to comply with these requirements.

Present defense counsel never sought appointment and was never appointed by the district court to represent defendant. On the contrary, he appeared as private counsel and at

defendant's request (R. 33). After the court granted defendant's motion for paid transcripts, it queried Mr. Huntsman as follows:

> THE COURT: Mr. Huntsman, let's [sic] me ask you just as an officer of the court, are you appearing in this matter as retained counsel or as pro bono counsel?
>
> MR. HUNTSMAN: Neither one, Your Honor. I've been paid nothing, I have accepted nothing, I've been offered nothing. But I don't want to waive any right to recover anything under the appropriate circumstances.
>
> THE COURT: All right. And I appreciate that record. I think that makes your circumstance clear.

(R. 288-89). What was clear was that Mr. Huntsman made no claim to having been appointed. *Amicus* aptly observes that Mr. Huntsman merely "assumed Swanson's defense" (Br. Am. at 16).

Furthermore, an assigned counsel is entitled to compensation only "upon the approval of the district court where the original trial was held." Utah Code Ann. § 77-32-3(3) (1990). Mr. Huntsman never sought or received this approval.

Neither defendant nor *amicus* cites any authority, and the State is aware of none, that would permit an unappointed "white knight" to ignore the statutory scheme, assume the defense of an indigent despite the availability of contract conflicts counsel, do nothing to dispel the court's impression that he was privately arranged, and then petition the appellate court for fees incurred at both trial and appellate levels.

This would be a different case had the trial court improperly refused to appoint conflicts counsel in the face of

defendant's colorable claim of conflict of interest. In that case, defendant might be entitled to the fees wrongly denied in the trial court and those generated in correcting the trial court's error. But here the trial court was not presented with and therefore did not deny any request for fees under section 77-32-2.[6]

Moreover, the State assails the basic fairness in granting this defendant's attorney's fees on this appeal. The only claim raised by defendant that is "warranted by existing law" or "based on a good faith argument to extend, modify, or reverse existing law," Utah R. App. P. 33(b), is her Brown claim. The remedy for a Brown violation is reversal of the conviction and remand for a new trial, or in this instance, a new plea. Brown, 853 P.2d at 859, 861. But the State stipulated to withdrawal of the guilty plea in the trial court (*see* R. 293). It seems inequitable to charge the county with funding an appeal for the purpose of achieving relief to which the prosecution stipulated in the trial court.

Finally, neither defendant nor *amicus* cites any authority, and the State is aware of none, supporting an award of attorney's fees for *amicus* (*see* Br. App. at 45). Accordingly, this Court "must disregard this issue." State v. Wareham, 772

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[6] In view of the trial court's issuance of a certificate of probable cause, it seems likely that it would have granted a defense motion for appointment of appellate conflicts counsel to litigate the conflict-of-interest issue.

P.2d 960, 966 (Utah 1989); State v. Amicone, 689 P.2d 1341, 1344 (Utah 1984); State v. Reiners, 803 P.2d 1300, 1301 n.2 (Utah App. 1990); State v. Webb, 790 P.2d 65, 71 n.2 (Utah App. 1990); Utah R. App. P. 24(d)(9).

POINT IV

THIS COURT LACKS JURISDICTION TO PROMULGATE A GENERAL ORDER GOVERNING ATTORNEY CONFLICTS OF INTEREST, NOR IS ONE NECESSARY

Defendant asks this Court to promulgate a "bright line" rule forbidding government attorneys and their associates to represent criminal defendants, whether retained or appointed (Br. App. 41-42).

As defendant herself apparently recognizes, the jurisdiction to promulgate such a general order is vested exclusively in the Supreme Court.[7] Article VIII section 4 of the Utah Constitution provides: "The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law." The court of appeals accordingly lacks jurisdiction to enter the general order that defendant seeks.

Moreover, there is a procedure by which general rules of professional conduct are adopted and promulgated by the Supreme Court. *See* Utah Code Jud. Admin. R. 11-101 ("Supreme Court rule on rulemaking process"). The procedure is *not* for the

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[7] His brief requests that the scope of Brown be expanded "by Supreme Court Order" (Br. App. 41).

court of appeals to announce such rules in judicial opinions resolving particular disputes.

Finally, defendant should take some solace in Opinion No. 126 of the Ethics Advisory Opinion Committee of the Utah State Bar (addendum F). This opinion, published after the filing of defendant's brief, brands as unethical much of the conduct defendant seeks to prohibit. While a Bar opinion is not binding upon practitioners and the courts, it serves notice that the Office of Attorney Discipline will investigate practitioners engaging in forbidden conduct.

POINT V

DEFENDANT'S REQUEST THAT THIS COURT DISMISS THE CHARGES AGAINST HER WITH PREJUDICE WAS NOT PRESERVED BELOW AND IS LEGALLY INSUPPORTABLE

Defendant asserts that she "has already suffered enough"; that she was "railroaded through a system unwilling to provide her with even the most rudimentary due process, and harassed by a hostile district court judge"; that the "voyeuristic arresting officers . . . did wilfully and contemptuously rape due process and rendered cruel and unusual punishment to one assumed to be innocent" (Br. App. 43). She further asserts that, as a victim of "Dixie justice," her "only meaningful remedy . . . is dismissal here and now of all her charges, with prejudice and on the merits" (Br. App. 43).

However, defendant filed no motion to dismiss below, on these or any other grounds. "A matter is sufficiently raised

only if it has been submitted to the trial court and the trial court has had an opportunity to rule on the question." State v. Phathammavong, 860 P.2d 1001, 1003 n.5 (Utah App. 1993). Where, as here, "the trial court never had an opportunity to rule on the question presented on appeal," this Court "will not address the question for the first time on appeal." Id.

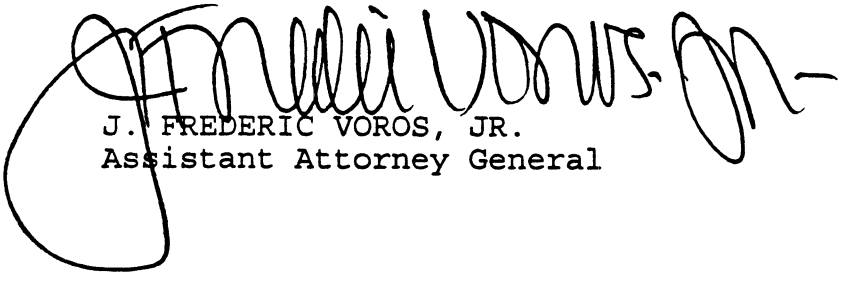
Moreover, defendant cites no authority, and the State is aware of none, indicating that dismissal of charges with prejudice is an appropriate remedy for any of defendant's alleged wrongs or where Brown has been violated or defense counsel found ineffective. For this reason alone this Court "must disregard this issue." Wareham, 772 P.2d at 966; Amicone, 689 P.2d at 1344; Reiner, 803 P.2d at 1301 n.2; Webb, 790 P.2d at 71 n.2; Utah R. App. P. 24(d)(9).

CONCLUSION

Based on the record on appeal and the applicable law, the State respectfully requests that this Court vacate defendant's guilty plea and remand this case for appointment of conflict-free counsel and re-prosecution.

RESPECTFULLY submitted on March 21, 1994.

JAN GRAHAM
Attorney General



J. FREDERIC VOROS, JR.
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed by first class mail this March 21, 1994 to each of the following:

R. CLAYTON HUNTSMAN, ESQ.
P.O. Box 1425
St. George, Utah 84770
Attorney for Appellant

KATHRYN D. KENDELL, ESQ.
#9 Exchange Place, #419
Salt Lake City, Utah 84111
Attorney for *Amicus Curiae* American Civil Liberties Union of Utah Foundation

ADDENDA

ADDENDUM A

Call The Law Offices Of

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ATTORNEYS AT LAW

Sitting: G. Michael Westfall, Russell J. Gallian Standing: Jeffery C. Wilcox*, John E. Hummel*, Jonathan L. Wright, and J. MacArthur Wright

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ATTORNEYS

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Anderson Timothy B
249 E Tabernacle Suite 200 St George 6

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Dunn Clifford V
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Ellis Glen J
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Westfall G Michael
Wilcox Jeffery C
Hummel John E
Wright J MacArthur
Wright Jonathan L
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(See Our Ad ON OPPOSITE PAGE)

Giffen John A
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Hafen Kendrick
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(Continued ON PAGE 25)

ADDENDUM C

ST GEORGE (Cont'd)

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ADDENDUM D

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*ALSO LICENSED IN NEVADA

Of Counsel:
J. MACARTHUR WRIGHT
JONATHAN L. WRIGHT

ADDENDUM E

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR
WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. SONJA LE SWANSON, Defendant.	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE HEARING OF THE DEFENDANT'S MOTION FOR A CERTIFICATE OF PROBABLE CAUSE Case No. 931500042

The above-entitled matter came before the Court on the Defendant's Motion for a Certificate of Probable Cause. A hearing was held on March 5, 1993, and continued on for further proceedings on March 8, 1993, and March 12, 1993. The Defendant was represented by Mr. R. Clayton Huntsman and was present at all the hearings. The State of Utah was represented by Mr. Wade Faraway, Deputy Washington County Attorney on March 5, 1993, and by Mr. Eric Ludlow, Washington County Attorney, on March 8th and 12th, 1993. The Court heard the evidence offered by the parties and reviewed the file and legal authorities submitted by the parties. The State of Utah took the position that the Certificate of Probable Cause should be entered at the conclusion of the hearing. However, the Court made certain Findings of Fact and Conclusions of Law from the bench regarding the relationship between Mr. J. MacArthur Wright, this Defendant's former counsel, and the law firm of Gallian, Westfall & Wilcox. The Court instructed Mr. Huntsman to prepare written Findings of Fact and Conclusions of Law in accord with the Court's ruling from the bench. Proposed Findings of Fact and Conclusions of Law were

submitted by Mr. Huntsman, but they did not conform with the Court's ruling. After instructing Mr. Huntsman to obtain a copy of the Court's tape recorded ruling to assist in the accurate preparation of the written document, the Court received another proposed pleading that was not complete or in accord with the Court's ruling.

Therefore, the Court obtained the official transcript of the proceedings of March 12, 1993, and from that source has prepared the following:

FINDINGS OF FACT

1. The Court specifically finds that on January the 13th, 1993, this defendant, Sonja Le Swanson, was arrested in her own home during a circumstance in which officers were executing a search warrant for controlled substances, and, in fact, discovered the controlled substance methamphetamine within her home. She was arrested and charged with the second-degree felony offense which is set forth in the Information in the file, possession of a controlled substance, methamphetamine.

2. The Court further finds that on the 14th day of January, 1993, Miss Swanson appeared personally before this judge, and at that time, I placed her under oath and questioned her with respect to her financial means to determine whether or not she should be appointed counsel. The Court determined at that time Ms. Swanson was indigent. The Court then appointed Mr. J. MacArthur Wright to represent the Ms. Swanson.

3. The Court finds that in the month of January, 1993, Mr. J. MacArthur Wright was serving as lead defense counsel for the public defender functions in Washington County. Mr. Wright and Mr. Douglas Terry alternate months during the 1993 calendar

year under their current contract with Washington County, as they had throughout the year 1992.

4. The Court specifically finds, from the bind-over order executed by Commissioner Lema, that the preliminary hearing was waived by this defendant pursuant to a plea agreement, and that the defendant was released from custody. The Court finds that the release from custody was foremost in the defendant's mind in reaching the plea agreement and entering the plea.

5. The Court finds that on March the 3rd of 1993, the defendant appeared before this court, for sentencing, and the Court executed the judgment, sentence, stay of execution of sentence, order of probation and commitment on March the 5th, two days later. As a condition of probation, the defendant was ordered to serve 60 days in the Washington County Jail, 30 days to be stayed upon the obtaining of substance abuse counseling.

6. With respect to the relationship between this defendant and the law firm of Gallian, Westfall & Wilcox and the public defender Mr. J. MacArthur Wright, the Court makes the finding that the relationship between Mr. Wright and the firm is one of landlord/tenant. The Court does not find that the description "office-sharing" is appropriate under these circumstances.

7. The Court specifically finds that in the relationship of landlord/tenant between Mr. Wright and the firm of Gallian, Westfall & Wilcox, Mr. Wright pays rent of $1,200 a month plus a percentage of the fees generated in civil cases. By "civil cases," the Court includes any civil litigation, contracts that might be drafted, adoptions, domestic relations, anything that is not related to criminal defense as appointed

counsel, in the way of the practice of law. The Court likens that relationship to any other commercial relationship where a base rent is established, and additional rent, based upon revenues of the commercial establishment, is due under the terms of the rental agreement.

8. In exchange for the rent paid, Mr. Wright receives office and associated space, access to the telephone which is the same telephone number as the firm, Gallian, Westfall & Wilcox as shown on the letterhead, Exhibit 2. Mr. Wright also receives receptionist and secretarial services.

9. The Court specifically finds that there is no evidence before the Court to persuade the Court that any prosecutorial function occurred out of the office of Gallian, Westfall & Wilcox during the period of time from January the 14th, 1993, until today's date.

10. The Court further finds that the prosecutorial relationship between the firm of Gallian, Westfall & Wilcox with the town of Ivins was terminated on the 11th day of March, 1993, at a town council meeting in the town of Ivins.

11. Prior to that time, the Court finds that the firm of Gallian, Westfall & Wilcox served as legal counsel to the Town of Ivins for both civil concerns as well as prosecutorial functions in cases involving the violation of town ordinances. The Court finds that as of the 11th of March, 1993, that no longer is the case, based upon the testimony of Mr. Gallian, the town attorney.

12. The Court further finds that there is no direct evidence of any conflict of interest between Mr. Wright in his representation of this defendant and the operation of the firm of Gallian, Westfall & Wilcox as the town attorney for the Town of Ivins.

13. The Court finds that there has been, throughout all of this relationship, a clear

and convincing effort on the part of Mr. J. MacArthur Wright and the firm of Gallian, Westfall & Wilcox to maintain the highest ethical standards not only required by the Code, but implied through the Code.

14. The Court specifically finds that the advertisement in Exhibit No. 1 is a scrivener's error, having omitted the term " of counsel" for Mr. J. MacArthur Wright and his son Jonathan Wright.

15. The Court finds that the "of counsel" designation has no definition in the statutes or the case law of the State of Utah, and the Court places no reliance on the use of that term.

16. The Court further finds that this defendant, Sonja Le Swanson, in a civil matter unrelated to this case, had retained as her counsel Mr. John E. Hummel, an associate of the firm of Gallian, Westfall & Wilcox, as her own counsel in a domestic matter which apparently is concluded. While that attorney/client relationship is not seen by this court as any waiver, it is a unique fact circumstance which is found by the Court.

17. The Court specifically finds that as of January 1st of 1993, Mr. Gallian is now serving as a Washington County commissioner. That among Mr. Gallian's executive functions as a Washington County commissioner is the budgetary supervision of the county attorney's office.

18. The Court specifically finds that Mr. Gallian's supervision is only budgetary, and that his elective position in no way impacts the prosecutorial decisions of the Washington County Attorney's office.

19. With respect to Ms. Swanson's representation by Mr. J. MacArthur Wright, the Court has already found that Ms. Swanson knowingly and voluntarily entered her plea.

The Court finds that she was represented by capable, competent counsel with many years' experience before the criminal bar. After review of the facts of this case as stated by Mr. Wright, after the waiver of client confidences, the Court finds that this Defendant was ably represented in the negotiation of this plea agreement.

20. The Court finds that this defendant knowingly and intentionally and voluntarily entered her plea of guilty on the 20th day of January, 1993. The Court conducted a careful Rule 11 colloquy with this defendant to make sure that she understood the rights that she would be giving up, the opportunities that she would have at trial, and the Court found then and finds now that Ms. Swanson appears to be operating under no duress, no threat or coercion, and frankly does not appear to this Court to be so naive as her Affidavit might set her out to be.

Based upon the foregoing Findings of Fact the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. The clear mandate set forth in the recent Utah Supreme Court case of State v. Brown, 201 Utah Adv. Rep 4, handed down on November 30, 1992, is quoted for reference:

> Although we do not decide whether it is constitutionally impermissible to appoint a city attorney with prosecutorial responsibilities to represent an indigent defendant, we conclude that vital interests of the criminal justice system are jeopardized when a city prosecutor is appointed to assist in the defense of an accused. Consequently, we hold that as a matter of public policy and pursuant to our inherent supervisory power over the courts, counsel with concurrent prosecutorial obligations may not be appointed to defend indigent persons; therefore, we reverse defendant's conviction and order a new trial.

2. The Utah Rules of Professional Conduct for attorneys states, in pertinent part:

Rule 1.10. Imputed Disqualification: General Rule.

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8(c), 1.9 or 2.2.

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially factually related matter in which that lawyer, or a firm with which the lawyer has associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

(1) The matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) Any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

3. The current version of Rule 27 of the Utah Rules of Criminal Procedure states:

(b) A certificate of probable cause shall be issued if the court hearing the application determines that there are meritorious issues that should be decided by the appellate court.

4. In balancing the mandate in State v. Brown, supra., with the facts as found in this case, the Court determines that there is a meritorious issue to be decided by the Utah Court of Appeals. Therefore, a Certificate of Probable Cause will issue.

5. Counsel for the Defendant should prepare the Certificate of Probable Cause and submit it to the Court for signature and entry.

DATED this ~~30th~~ 31st day of March, 1993.

JAMES L. SHUMATE
DISTRICT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing Findings of Fact and Conclusions of Law to the following counsel this 1st day of April, 1993, by first class mail, postage pre-paid:

Mr. R. Clayton Huntsman
2 West St. George Boulevard, No. 31
St. George, Utah 84770

Mr. Eric Ludlow
Washington County Attorney
178 North 200 East
St. George, Utah 84770

Deputy Clerk

ADDENDUM F

Utah State Bar Commission Approves Ethics Opinions & 60-Day Comment Period

The Board of Bar Commissioners has adopted a policy whereby ethics opinions will be approved, pursuant to the recommendations of the Ethics Advisory Opinion Committee, pending a 60-day comment period following publication in the *Bar Journal.*

Opinion No. 126
Approved January 27, 1994

Issue: Under what circumstances may a city attorney represent criminal defendants?

Opinion: A city attorney with prosecutorial functions may not represent a criminal defense client in any jurisdiction. A city attorney with no prosecutorial functions, who has been appointed as city attorney pursuant to statute, may not represent a criminal defense client in that city, but may represent a criminal defense client in other jurisdictions, provided that Rule 1.7(a) of the Utah Rules of Professional Conduct is satisfied. An attorney with no prosecutorial functions, who is retained by a city on a contract or retainer basis, may represent a criminal defense client in any jurisdiction, provided that Rule 1.7(a) is satisfied. An attorney who is a partner or associate of a city attorney may not represent a criminal defense client in any situation where the city attorney is so prohibited.

Opinion No. 138
Approved January 27, 1994

Issue: May a currently practicing sole practitioner who formerly had associates or junior partners continue to use the firm name that includes the sole practitioner's name followed by "& Associates"?

Opinion: A lawyer may not use "& Associates" as part of a firm name where no attorney associates are currently employed by that firm.

Opinion No. 139
Approved January 27, 1994

Issue: May a law firm's nonlawyer office administrator be compensated solely on the basis of a percentage of the gross income of the firm?

Opinion: Under Rule of Professional Conduct 5.4(a)(3), a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, which may be based upon a percentage of the net or gross income of the firm, so long as compensation is not tied to receipt of particular fees. The nonlawyer's employment, however, must still comport with Rule 5.4(d), which prevents the nonlawyer from owning an interest in or controlling the activities of a law practice.

ANNOUNCEMENT: Recruiting Ethics Advisory Committee Members

The Utah State Bar is now accepting applications for membership on the Ethics Advisory Opinion Committee for terms beginning July 1, 1994.

In response to the increasing importance and frequency of occurrence of ethical issues that affect Utah lawyers, the Board of Bar Commissioners has modified the procedure for constituting the Ethics Advisory Opinion Committee. Beginning July 1, 1994, the Committee will comprise the Chair and 12 members, who will be appointed upon application to the Bar. Regular appointments will be for three years, although some appointments will be initially for one and two years to provide for staggered terms.

The Committee is charged with preparing written opinions concerning the ethical propriety of anticipated professional or personal conduct, when requested to do so by the Utah State Bar, and forwarding these opinions to the Board of Bar Commissioners for their consideration.

Because the written opinions of the Committee have major and enduring significance to the Bar and the general public, the Board wishes to solicit the participation of lawyers (including the judiciary) who can make a significant commitment to the goals of the Committee and the Bar.

If you are interested in serving on the Ethics Advisory Opinion Committee, please submit an application with the following information, either in resume or narrative form:

- Basic information, such as years and location of practice, type of practice (large firm, solo, corporate, government, etc.), and substantive areas of practice.
- A brief description of your interest in the Committee, including relevant experience, interest in or ability to contribute to well-written, well-researched opinions. This should be a statement in the nature of what you can contribute to the Committee.

Appointments will be made by a panel comprising the Bar President, the Liaison Commissioner for the Ethics Advisory Opinion Committee and the Chairman of the Committee for the ensuing year. The panel's selections are intended to accomplish two general goals:

- Appointment of members who are willing to dedicate the effort necessary to carry out the responsibilities of the Committee and who are committed to the issuance of timely, well-reasoned, articulate opinions.
- Creation of a balanced Committee that incorporates as many diverse views and backgrounds as possible. The selection panel will attempt to create a Committee with balance in: substantive practice areas, type of practice (small firm, government, etc.), geographical location, and experience.

If you would like to contribute to this important function of the Bar, please submit a letter indicating your interest to:

Ethics Advisory Opinion
Committee Selection Panel
Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111

NOTICE

The 12th Annual State and Local Government Conference, sponsored by the Government and Politics Legal Society of the J. Reuben Clark Law School, will be held at the Provo Park Hotel on Friday, March 18, 1994.

Any questions should be directed to Alex Maynex at 378-3593.